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No. 95-1728

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JANETTE LOHMAN,
THE MISSOURI DEPARTMENT
OF REVENUE AND THE STATE OF MISSOURI,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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The omissions from the Brief of the United States in Opposition (Brief in Opp.) are as telling as what the brief actually says. Both indicate the necessity of review by this Court. Without such review Missouri and eventually other states will be denied their sovereign right to place the legal incidence of their sales tax where they choose and the federal government will have secured sovereign tax immunity for the purchasing activities of one of its contractors, in contravention of this Court's precedents.

1. The government, quoting from its 1951 Contract, says that Kansas City Power & Light Company (KCPL) agreed to "sell and deliver to the Government" and the government agreed to "purchase and receive ... electrical service." Brief in Opp., p. 2. The government's brief then jumps to a 1962 amendment of the Contract. The brief ignores the significant events of 1960 that the 1962 amendment merely memorialized. In 1960 the government issued a "procedure governing purchases" by Remington (Olin's predecessor) and every other federal management contractor "under indefinite delivery type contracts negotiated by government agencies," such as the 1951 Contract with KCPL. JA, Vol. VI, 1785.[1] Under this procedure the

[1] "JA" refers to the joint appendix filed in the court of appeals.

operators were to directly order and pay for electricity. The government "expected that almost without exception vendors holding Government contracts of this type will accept the ... contractor's purchase or delivery orders in lieu of Government orders." *Id.* KCPL readily accepted the new procedure and Remington's purchase order. JA, Vol. VI, 1792-96. Remington thus became the "purchaser" of the electricity and labeled itself as such. JA, Vol. V, 1709. When Olin took over the operation of the Plant, it continued to perform Remington's purchasing activities, ordering and paying for the electricity.[2]

In 1960 the federal government recognized that the change in the method of ordering and paying for electricity was likely to have tax consequences. JA, Vol. VI, 1785-1787. The federal government then amended the Contract with KCPL to specifically permit its Plant operator to order and pay for the electricity. JA, Vol. III, 674. After Olin became the contractor-operator of the Plant, Olin issued a purchase order in its own name to KCPL, listing itself as "buyer," directing KCPL to replace Remington's purchase order and prime contract numbers with Olin's, assigning rating DO C-3 (applicable only to "purchases" of supplies, JA, Vol. III, 866-67) to the purchase order and asserting a right to cancel the 1951 Contract for the delivery of electrical services. JA, Vol. V, pp. 1618-1622. KCPL complied with all the directives in Olin's purchase order (JA, Vol. V, pp.

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[2] The government labels Olin's purchase order mere "correspondence." Brief in Opp., p. 11, n 6. The document is actually and accurately labeled a purchase order. JA, Vol. V, 1618-1622. Contrary to the Eighth Circuit's labeling of this document as an administrative purchase order, Olin has only one form of purchase order. JA, Vol. VI, 1976.

1677, 1681 & 1683), and listed Olin as its "customer" on future invoices. JA, Vol. V, 1660-76. Olin uses the electricity it orders to run the Plant and pays for it with its private funds.

The federal government says an Olin witness testified that Olin did not order the electricity. Brief in Opp., p. 4, n 2. Of what consequence then was the 1962 Contract amendment, quoted by the government, calling for KCPL to accept orders for electrical service from the Plant's contractor-operators? The federal government offers no explanation and the evidence does not demonstrate that the government resumed ordering electricity for the Plant. The federal government did find an Olin employee who testified, on May 15, 1991, that Olin did not order electricity. Of course, this testimony directly contradicted the prior testimony of the federal government's own employee/witness (the contract administrator at the Plant), the first witness heard in the case. He testified at the preliminary injunction hearing on September 14, 1990 and his testimony was clear and unambiguous; Olin ordered the electricity.[3]

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[3] His testimony was as follows:

Q: Is it correct ... to say that the contractor-operator of the plant orders the [electrical] service that is delivered?

A: It is correct to say that this agreement [the 1962 amendment] indicates that the contractor-operator orders for service may be placed with the contractor, meaning Kansas City Power & Light, yes.

Q: So is it fair to say that Olin orders the electrical power under this agreement?

A: Yes.

JA, Vol. I, 130.

Missouri was entitled to rely on this admission by the government's employee/witness, and the government is precluded from using its later-acquired inconsistent testimony to defeat Missouri's motion for summary judgment. *E.g., Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995). The government's attempt to ignore Olin's purchase order and the testimony of its own employee/witness demonstrates the weakness of its position.[4] Under the circumstances of this case, no constitutional basis exists for denying Missouri its sovereign power to tax KCPL's transfer of the electricity to Olin. It is not only the facts of this case that are compelling.

2. Without ever mentioning the provisions of Missouri law making the transfer of the state's sales tax elective, the federal government (like the Eighth Circuit) asserts that "Missouri law [not federal law] requires the [sales] tax to be passed on to the purchaser." Brief in Opp., pp. 7 & 10. This declaration of Missouri law is false. To deny this petition would authorize the courts of appeal to declare the meaning of state tax laws without considering the entire state statute -- a practice that would wreak havoc with state tax jurisprudence.

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[4] This weakness is further demonstrated by the government's suggestion that the district court did not resolve who purchased the electricity. The federal government says "the court concluded that, *if* the sales by KCPL had been made to Olin, then Olin purchased the electrical power for resale to the United States ...." Brief in Opp., p. 6, emphasis added. There was no "if" in the district court's order. Rather, the district court ordered Missouri to cease the imposition of sales tax "on purchases of electrical power by the contractor operator of the Plant ... because the contractor operator purchased the electrical power with the purpose of reselling it the United States." Petitioners' Appendix, A-15.

The federal government, supported by the Eighth Circuit, concludes that Missouri law requires a seller to pass along the state's sales tax to the purchaser. Both rely on Mo. Rev. Stat. § 144.080.4, providing that a seller "shall collect the tax from the purchaser", and § 144.060, imposing a duty on the purchaser to pay the tax to the seller. But even these two sections point to Missouri's statutory reality: the seller is not required to pass along the state's sales tax to the purchaser. Both sections explicitly reference Mo. Rev. Stat. § 144.285, which the federal government and the court of appeals are determined to ignore.

This section, along with Mo. Rev. Stat. § 144.080.5, grants sellers the privilege of stating a price for their merchandise unadorned by the inclusion of sales tax. Under § 144.285.5 the amounts that a seller collects from a purchaser as sales tax are excluded from the computation of taxable gross receipts "if," and only "if", the sales tax amount has been "separately charged or stated." Similarly, § 144.080.5 prohibits a seller from advertising that sales tax "will not be separately stated and added to the selling price." Nothing in Missouri law prohibits a Missouri seller from failing to separately state and add to the sales price the amount of the tax. Under Missouri law the seller may elect to separately state the tax applicable to a sale and thereby require the purchaser to pay it, or the seller may elect to state only the final sales price and thereby include the tax as a cost of doing business. Missouri's relevant tax regulation, complete with demonstrative examples, confirms this reading of the law and is reprinted in the supplemental appendix attached hereto.

Missouri law does not require a seller to separately state and add to the purchase price the sales tax due on the

transaction. Once the voluntariness of charging the purchaser for the sales tax is established, the law discussed in the Petition readily demonstrates that the legal incidence of Missouri's sales tax is laid upon the seller and not the purchaser. Permitting the contrary result reached by the Eighth Circuit to stand infringes on Missouri's and every other state's sovereign right to place the legal incidence of their sales tax where they choose.

3. The Eighth Circuit and the federal government find comfort in the result reached in *U.S. v. Kabeiseman*, 970 F.2d 739 (10th Cir. 1992), but it is the distinctions between *Kabeiseman* and this case that dictate a different result here. In *Kabeiseman* the federal government contracted for the delivery of diesel fuel to be delivered to a federal facility that produced crude oil and natural gas. There were no modifications of the contracts there at issue to permit the operator of the federal facility (rather than the government itself) to order and pay for the diesel fuel. There was no government description of the activities to be undertaken by the operator as a purchase. There was no document issued by the operator, labeled a purchase order, describing the operator as the buyer. All these facts are present in this case.

Furthermore, the court in *Kabeiseman* mentions three times that the operator issued checks on federal funds for the diesel fuel delivered to the federal facility. Here Olin pays for the electricity with its own private funds; it later requests reimbursement for these funds on a document labeled "Public Voucher for *Purchases* and Services Other than Personal." JA, Vol. I, 157 and Vol. II, 319 (emphasis added). Olin is the federal government's independent contractor (JA, Vol. V, 1577), not its purchasing agent (JA, Vol. VI, 1805).

But the federal government says that "[o]nly the credit of the United States is involved" in the transaction at issue here. Brief in Opp., p. 12. Not so. Olin's credit is involved. In this regard this case is like *Alabama v. King & Boozer*, 314 U.S. 1, 10 (1941), in which this Court found that the credit of a federal contractor was involved when the contractor was obligated to pay for the material despite the fact that the government reserved the right "to pay directly ... all sums due from the Contractor." Olin had the obligation to pay for the electricity and the federal government stood only as an inchoate guarantor of Olin's obligation. That the federal government might ultimately be liable on a sale, if Olin failed to perform, does not dictate a finding of sovereign tax immunity for those transactions when Olin did perform. *U.S. v. New Mexico*, 445 U.S. 720, 743 (1982). The decision of the Eighth Circuit establishing that the federal government can be declared the purchaser entitled to sovereign tax immunity any time it might have to pay for the commodity (and the embrace of that conclusion by the federal government), demonstrates the dramatic impact of what on its face may appear a narrow, technical decision.

4. The government relies largely on labels. It claims that it is the purchaser of the electricity because the 1951 Contract for electrical services says that KCPL agreed to sell and deliver electricity to the government and the government agreed to purchase and receive the electricity. Brief in Opp., pp. 2 & 11. This Court rejected such labeling arguments in its last significant sovereign immunity case, noting that constitutional immunities cannot rest on an approach that allows government functionaries "to draw the constitutional line by changing a few words in a contract." *U.S. v. New Mexico*, 445 U.S. 720, 737 (1982) (quoting *Kern-Limmerick, Inc. v. Scurlock*, 347 U.S. 110, 126 (1954)

(dissenting opinion)). The government's argument against granting certiorari proves that *New Mexico's* acceptance of the dissent's view in *Kern-Limmerick* was not enough.

Attempting to demonstrate continuing conformity with the Contract's "sell and deliver" language, the federal government asserts that the power is delivered to federally owned substations. Brief in Opp. pp. 3 & 12. Electricity is not delivered to substations, it passes through them. Electricity is based on the flow of current and the presence of voltage. JA, Vol. I, 104. If the switch completing a circuit is open there is no energy in the line because there is no current; rather electricity instantly flows from the point of generation to the load when the switch is closed. JA, Vol. I, pp. 104-06. Olin is the party that controls both the switches closing the circuits and the equipment that consumes the electricity. JA, Vol. I, 253. Electricity is not delivered to the government's substations where it awaits use; it is delivered through them and used instantly. JA, Vol. I, 104-06.

Still seeking to rely on its original Contract and ignore its amendment and the practices of its contractors, the federal government invokes the appellate court's declaration that the federal government has a contractual relationship with the seller. This could be relevant if Missouri were attempting to tax that contractual relationship. But it is not. Missouri taxes one category of sales, those made at retail. This means sales transferring title or ownership (defined as the exercise of dominion or control) to a purchaser for use or consumption, not for resale, for a valuable consideration. Here Olin received control of the electricity directly from KCPL and Olin paid KCPL for it. No existing principle of constitutional immunity prohibits Missouri's taxation of this transaction.

5. The reasons for granting Missouri's petition for writ of certiorari are weighty. This Court has never sanctioned the federal government's interference with a state's power to place the legal incidence of its sales tax where it chooses. The Eighth Circuit's opinion does just that by refusing to recognize or even discuss those provisions of Missouri law that make the transfer of the sales tax from the seller to the purchaser an option accorded the seller. Furthermore, this Court has never held that sovereign tax immunity strips a state's power to tax the activities of a federal contractor that orders, uses and pays for a commodity with its own funds. In fact, this Court has previously held that if the federal government wants more protection for its contractors from state taxation it must rely on the legislative process, not the Constitution. *New Mexico*, 455 U.S. at 737 and 744. The Eighth Circuit has authorized the federal government to ignore that direction by this Court and, simultaneously, interfered with Missouri's retained sovereign power to tax federal contractors.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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